No. 16226

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

BRIEF OF APPELLEES THE HOME INSURANCE COMPANY AND THE CANADIAN FIRE INSURANCE COMPANY.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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BRIEF OF APPELLEES THE HOME INSURANCE COMPANY AND THE CANADIAN FIRE INSURANCE COMPANY.

I.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION.

This action was commenced by plaintiffs C. R. Morris and Constance B. Honaker in the Superior Court of the State of California, in and for the County of San Diego. By petition of Appellee, The Canadian Fire Insurance Company, the action was removed to the Federal Court. [Tr. pp. 3-5.] It appears from Plaintiffs' complaint and from the petition that both Plaintiffs were citizens and residents of the State of California, and it appears from said petition that all of the defendants were citizens and residents of other jurisdictions, to-wit, The Canadian Fire

Insurance Company of Winnipeg, Canada, Tri-State Mutual Grain Dealers Fire Insurance Company of the State of Minnesota, and The Home Insurance Company of the State of New York. [Tr. pp. 3-4.] It was stipulated in the Amended Pre-Trial Stipulation "that the court has jurisdiction over the subject matter and the parties," as well as to the residence and citizenship of the parties as heretofore set forth. [Tr. pp. 36-37.] The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

The statutory provisions believed to sustain the jurisdiction of the District Court to determine the cause are 28 U. S. C. A. 1332(a), 1441 and 1446. The jurisdiction of the United States Court of Appeals to review the judgment in question is based upon 28 U. S. C. A. 1291 and 1294.

II.
STATEMENT OF CASE.

Appellees agree that the statement of the case as set forth in the brief of Appellant Tri-State Mutual Grain Dealers Fire Insurance Company (hereinafter referred to as Tri-State) is correct with the exception of the last paragraph thereof and with that exception these Appellees adopt said "Statement of the Case."

In lieu of said last paragraph of Appellant Tri-State's "Statement of the Case," the Appellees, The Home Insurance Company (hereinafter referred to as Home), and The Canadian Fire Insurance Company (hereinafter referred to as Canadian), contended in the court below, as shown by the Pre-Trial Stipulation, that:

> "(a) Home Company and Canadian Company policies were not in (38) effect as to plaintiffs' interest at the time of loss.

"(b) That plaintiffs' causes of action are barred by provisions contained in the Canadian Company and Home Company policies as follows: 'loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement, or (b) endorsement thereon.'

"(c) That the named insured, Rose W. Gilmore, did not have title to the subject property, and as such, plaintiffs or either of them, had no title to said property under Rose W. Gilmore.

"(d) That the loss, if any, of plaintiffs' interest was insured by defendant, Tri-State Company.

"(e) The action herein was prematurely brought by reason of the fact that neither the insured, Rose W. Gilmore, or plaintiff, or either of them, rendered proof of loss to Defendants, Home Company and Canadian Company.

"(f) Plaintiffs' action is barred by the limitation period prescribed in Home Company and Canadian Company policies, the date of loss being September 27, 1955, and the date of filing of Plaintiffs' complaint, September 27, 1956." [Tr. pp. 35-36.]

III.

SUMMARY OF ARGUMENT.

1. Appellees' policies were not in effect as to plaintiffs' interests at the time of the loss.

2. The named insured, Rose W. Gilmore, had no title to the property and plaintiffs did not acquire title through her.

3. The Appellant, Tri-State, was the sole insurer of plaintiffs' interests at the time of the loss.

IV.
ARGUMENT.

1. Appellees' Policies Were Not in Effect as to Plaintiffs' Interests at the Time of the Loss.

The named insured in these Appellees' policies was one Rose W. Gilmore, who had entered into an escrow agreement to purchase property from Aubrey L. Owens and Emo T. Owens. [Tr. p. 32.] The Appellees, plaintiffs below, were beneficiaries of first and second trust deeds but they had made no agreement or contract with Rose Gilmore and Rose Gilmore had not, at the time of the loss, become liable to pay them. There had been no assumption by Rose Gilmore of the promissory notes securing the trust deeds; the purchaser, Gilmore, was not at the time of the loss the mortgagor of the property and had assumed no duties to the Appellees, who were the beneficiaries of the trust deeds. As between the purchaser and the beneficiaries of the trust deeds no rights, duties, or liabilities had been created at the time of the loss in question.

The escrow instructions which were admitted into evidence as Exhibit I [Tr. p. 72], mention that "title will be shown free of encumbrances" with the usual exceptions, including the trust deeds of record of the two plaintiffs below, but they fail to include an express agreement by the purchaser, Gilmore, to assume the debt secured by the trust deeds. An agreement to assume a debt secured by a trust deed is not established by a recital in the deed that the conveyance is subject to the trust deed. (*Gursky v. Rosenberg,* 105 Cal. App. 410, 287 Pac. 575.) In this instance, even if it be assumed (though it is not stated in the escrow instructions) that the buyer, Gilmore, intended to assume the obligations of the trust deeds and notes, no such obligation had arisen at the

time of the fire because the sellers had not fulfilled their obligations under the escrow, which had not closed at the time of the fire. [Tr. p. 32.] No money consideration had passed between Rose W. Gilmore and the plaintiffs below and the plaintiffs' trust deeds were executed and recorded prior to the agreement by Rose W. Gilmore to purchase the property. [Tr. p. 34.] The plaintiffs below were unable to establish any existing rights against Gilmore and, therefore, cannot rely upon any such right in an attempt to reach the policies of insurance issued by these Appellees.

The trial court's Conclusion of Law number 4 reads as follows:

> "4. That the policies of insurance prepared by Home Company and Canadian Company, although delivered to Rose W. Gilmore, were not to become effective as to Rose W. Gilmore or plaintiffs or either of them, until said escrow closed; that said policies were to be substituted for the Tri-State policy at the close of said escrow; that said escrow had not closed at the time of said loss and the policies of defendants Home Company and Canadian Company, were not in force and effect at such time." [Tr. p. 55.]

Appellant, Tri-State, attacks this finding with the statement:

> "Little need to be said about this conclusion. The court evidently drew this conclusion from thin air." (App. Br. p. 16.)

To the contrary, the trial court had considerable basis in fact for this conclusion, as stated in the court's Memorandum Opinion:

> "(5) It's common knowledge in connection with escrows, that new insurance to be substituted

> must be written or dated prior to the close of escrow. The date of close of escrow cannot often be accurately gauged. Thus, when the escrow closes, the old insurance is cancelled, premiums are prorated and rebated and the new insurance becomes effective." [Tr. p. 42.]

Legal support for the court's conclusion and reasoning is found in *Strauss v. Dubuque Fire & Marine Ins. Co.,* 132 Cal. App. 283, 22 P. 2d 582, 586, where the court stated:

> "It is next asserted that the policy issued by the defendants was never cancelled. If the plaintiffs mean that the policy was never indorsed in ink 'cancelled,' then their contention conforms to the facts. However, an insurance policy is in effect cancelled when another policy is substituted for it. Stevenson v. Sun Insurance Office, 17 Cal. App. 282, 288, 119 P. 529; New Zealand Ins. Co. v. Larson Lumber Co. (C. C. A.) 13 F. (2d) 374."

The Tri-State policy was not cancelled and, according to the Pre-Trial Stipulation, the Tri-State policy was in force as to plaintiffs' interests at the time of the loss. [Tr. p. 35.]

We submit that the trial court correctly analyzed the nature of the escrow involved in this action and the legal effect therof. No intention to procure double insurance in favor of the beneficiaries of the deeds of trust and notes is anywhere shown in the record. The intent was to substitute the Home and Canadian policies at the close of escrow and since escrow had not closed and Gilmore owed no obligation to the holders of the trust deeds, Home and Canadian likewise owed no obligation to them. The legal principle is succinctly set forth in 27 Cal. Jur. 2d, p. 793, Insurance Section 293, which cites in support

thereof *Wells Petroleum Co. v. Fidelity-Phenix Fire Ins. Co.*, 121 Fed. Supp. 739:

> "Generally, the procurement of new insurance with intent that it shall take the place of existing insurance, and with no intent to thereby acquire additional insurance, constitutes an effective voluntary cancellation of the existing insurance, in which case the insured may not recover under both policies, despite physical possession, by the insured or his agent, of the original policy, and though the premium return, due on cancellation of the original policy, has not been made at the time the loss occurs."

As stated in *Hayward Lumber & Investment Co. v. Lyders,* 139 Cal. App. 517, 34 P. 2d 805, 811:

> "The 'interest' of the mortgagee referred to in such a clause is not his interest in the property insured, but the 'interest' or amount which the mortgagor has appointed him to collect from the proceeds of the policy."

It would scarcely be realistic to suppose that a purchaser of property would have any desire to have a mortgagee or trust deed holder collect for him where the purchaser had not as yet assumed any obligation under the mortgage or trust deed.

2. The Named Insured, Rose W. Gilmore, Had No Title to the Property and Plaintiffs Did Not Acquire Title Through Her.

Had the vendor at the time of the loss, or prior thereto, defaulted to the holders of the trust deeds and lost or relinquished title, the purchaser, Gilmore, could have avoided the contract because of material failure or consideration. The case of *Vierneisel v. Rhode Island Insurance Co.,* 77 Cal. App. 2d 229, 175 P. 2d 63, holds

that where grantors had executed written escrow instructions and delivered a fire policy and deed to the escrow holder, but the grantees were not then entitled to receive the deed and the conditions of the escrow were not certain to happen title had not passed to the grantee and the grantors were entitled to collect on their policy as sole and unconditional owners. Likewise, in this case the escrow had not closed, title had not passed and the conditions of the escrow were not certain to happen. The appellant states, without basis, that the trial court misconceived the holding in the *Vierneisel* case (Appellant's Br. p. 11), and comments that in the case of *Central Manufacturers Mutual Ins. Co. v. Jim Dandy Markets, Inc.,* the *Vierneisel* case was distinguished. In the instant case, however, the passing of title, which does not occur until delivery of the deed and compliance with the terms of the escrow, is of great importance in the determination as to whether Appellees' policies were effective at the time of the loss. As stated in *Holman v. Toten*, 54 Cal. App. 2d 309, 128 P. 2d 808, 810:

> "It is true, Holliday's deed to plaintiff appears not to have been delivered to plaintiff from the escrow until April 14, 1941. The conditions fixed for its delivery were not such as were certain to happen, and hence title to the property did not pass to the plaintiff merely by reason of the deposit of the deed in escrow. Civ. Code, Sec. 1057."

Civil Code, Section 1662, cited by Appellant, deals with contracts for the "purchase and sale of real property" and provides for certain rights and duties which apply unless the contract expressly provides otherwise. If the purchaser is in possession of the subject matter the statute provides that by destruction without fault of the vendor "* * * the purchaser is not thereby relieved from a

duty to pay the price." This section does not purport to create a duty on the part of the purchaser where no such duty existed previous to the destruction of the subject matter of the contract but, rather, simply states that such destruction does not relieve the purchaser from a duty to pay. Since the escrow had not closed, since there was no obligation on the part of the purchaser, Gilmore, to the holders of the trust deeds at the time of the fire, Gilmore's "duty to pay the price" had not yet arisen and therefore the Code section is not applicable here.

3. The Appellant, Tri-State, Was the Sole Insurer of Plaintiffs' Interests at the Time of the Loss.

Appellant, Tri-State, argues that "* * * the real point in issue was whether or not the plaintiffs had insurance other than that of this appellant * * *." It appears that the Appellant's argument on this point is based upon a misconception of the mortgage clause attached to its policy. This misconception arises from a failure to consider the provision of the policy that the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner. It is stated in Couch Cyclopedia of Insurance Law, Vol. 5, page 4441, Sec. 1215b:

> "And a mortgagee, in whose favor a loss is made payable as his interest may appear, is not affected by additional insurance procured by the owner upon the property without his knowledge or consent, though there is a rider attached to the policy to the effect that, if other insurance shall exist on the property, the company shall be liable only for such proportion of the loss sustained as the amount of its policy shall bear to the whole insurance on the property insured, whether the other insurance applies in the same man-

ner or not; the provisions respecting the other insurance affect the interest of the insured only, and not that of the mortgagee, unless additional insurance is obtained for his benefit and with his knowledge."

There is no contention here that at the time of the loss the mortgagee had any knowledge of the policies taken out by the prospective purchaser and, in fact, although the mortgagees filed a proof of loss with Appellant, Tri-State [Tr. p. 33], none was filed with either the Home or the Canadian. [Tr. p. 34.] It was held in *Queen Ins. Co. v. People's Union Sav. Bank,* 50 F. 2d 63 (C. C. A. 3rd) that a mortgagee without knowledge at the time of the loss that a mortgagor had obtained other insurance did not by joining in the suit on the other policies diminish its recovery under the pro rata clause. A similar ruling was made in *Hardy v. Lancashire Ins. Co.,* 166 Mass. 210, 44 N. E. 209. There a policy of insurance payable to mortgagees as their interests might appear provided that if there should be other insurance the insured should recover no greater proportion of the loss than the sum thereby insured bore to the whole amount insured. A rider provided that in event of other insurance the company would be liable only pro rata, whether such insurance applied in the same manner or not. It was held that the limitation as to the amount to be paid in the policy affected only the interests of the named insured and the taking out of additional insurance by the mortgagor payable to himself, without the knowledge of the mortgagees, could not affect the right of the mortgagees to recover the full amount of the policy on a total loss.

It is basic that a policy of insurance does not insure property as such but only the interest of the insured in the property. *Alexander v. Security-First Nat. Bank of Los Angeles,* 7 Cal. 2d 718, 62 P. 2d 735. The policy

of Tri-State was admittedly in force and effect as to the plaintiffs' interests at the time of the loss. [Tr. p. 35.] The mortgagees derived no interest in the property from Gilmore, in whose favor the policies were written by Appellees, their interest being acquired solely as a result of an obligation of Tri-State's named insured.

The Honorable James M. Carter, Judge of the District Court, prepared a Memorandum Opinion in which various issues and findings of the case are discussed. For the sake of brevity in this brief we refer this Honorable Court to this Memorandum Opinion for the points which were not raised in Appellant's Brief.

Conclusion.

These Appellees issued policies of insurance which, we respectfully urge, the trial court correctly found were not to become effective until the close of escrow, which had not occurred at the time of the fire. The policy of Appellant, Tri-State, was admittedly in effect as to the holders of the trust deeds, and the trial court correctly found Tri-State liable in the face amount of its policy.

Respectfully submitted,

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